

**Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.**

DATE: May 23, 1997
CASE NO: 95-INA-623

In the Matter of:

CANNON DESIGN GROUP
Employer

On Behalf of:

SHOBA SIVAKOLUNDU
Alien

Appearance: Richard T. Griffin
Las Angeles, CA
For the Employer and Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the

place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,¹ and any written argument of the parties. § 656.27(c).

Statement of the Case

On June 8, 1993, Cannon Design Group ("employer") filed an application for labor certification to enable Shoba Sivakolundu ("alien") to fill the position of Assistant Urban Designer at a yearly wage of \$32,000 (AF 47). The job duties are described as follows:

Will directly assist principal designer in analysis of site and zoning information; participate in field studies and prepare basic maps; draw conceptual schematic diagrams, draft detail drawings for Street/Facade Improvement Programs and small-scale commercial rehabilitation projects; aid senior planner in compiling reports for Master/Specific/Historic Conservation Plans and Downtown Revitalization Projects; help analyze and present revenues/costs and project scheduling charts for Implementation Strategies (AF 44).

The job requirements are a Master's degree in Urban Design with one year of experience in the job offered or the related occupation of Long Range Planning Analyst. Other special requirements are specified as follows:

Advanced academic background and experience directly related to position duties and including: IBM PC/Intergraph including system maintenance; design/development of base maps using CAD/GIS software-ARC Info, Auto CAD, IGDS; generate/scan/enhance graphics using Imagein, CorelDraw, Page Maker, Illustrator; analyze statistical information using dBase, Lotus, Paradox, time schedule/resource allocation for architecture/planning projects using HTPM and Timeline (AF 42).

On August 17, 1994, the CO issued a Notice of Findings proposing to deny the labor certification. The CO cited a violation of § 656.20 (c) (2) which provides that a job offer must show that the wage offered equals or exceeds the prevailing wage when the alien begins work. Furthermore, § 656.40 (a) (2) (I) provides that the prevailing wage shall be the average rate of wages paid to workers similarly employed in the area of intended employment. The CO objected to the employer's wage offer of \$32,000 which was well below the prevailing wage of \$46,716. Accordingly, the CO requested that the employer take corrective action by (1) increasing the rate

¹ All further references to documents contained in the Appeal File will be noted as "AF."

of pay to the prevailing wage, (2) demonstrating that the wage offer was within five percent or in excess of the prevailing wage, or (3) contesting the prevailing wage finding (AF 36).

In the NOF, the CO also found the employer's Master's degree requirement to be unduly restrictive. Section 656.21 (b) (2) provides that the employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements. The CO noted that the position is for an Assistant Urban Designer and that a Master's degree is typically not required for the successful performance of this job. § 656.21 (b) (2). The CO therefore requested that the employer take corrective action by (1) deleting the restrictive requirement and retesting the labor market, or (2) justifying the requirement by showing business necessity (AF 38). Finally, the CO determined that the employer violated § 656.21 (b) (6) which provides that an employer must provide lawful, job-related reasons for the rejection of U.S. workers. Specifically, the CO disputed the rejection of Applicants Hardy, Blake, Blackwell, and Ceremona. The CO therefore instructed the employer to explain, with specificity, the lawful, job-related reasons for not hiring these four U.S. workers.

In rebuttal, dated September 21, 1994, the employer argued that the prevailing wage for the position of Urban Designer is difficult to calculate because it bridges the gap between the fields of Architecture and Urban Planning. The employer submitted prevailing wage information relating to both of these fields which shows salaries for low to mid-level workers ranging from \$24,949 to \$33,920. The employer maintained that the offered salary falls within five percent of this range. The employer rebutted the unduly restrictive requirement issue by stating that no university in the United States offers an undergraduate degree in Urban Design. The employer therefore required applicants to have a Master's degree in Urban Design because it is offered only as a two-year master's program. The employer asserted that a person having only a Bachelor's degree in architecture would be unable to perform the duties expected of this position (AF 13). The employer argued that Applicants Hardy, Blake, Blackwell, and Ceremona were interviewed and subsequently rejected for lawful job-related reasons. The employer rejected Mr. Hardy because he has no formal training in Architecture; Mr. Blake because he has no planning or computer program experience; Mr. Blackwell because he possesses only minimal computer experience in the relevant programs, and; Mr. Ceremona because he does not possess a Master's degree in Urban Design (AF 17).

The CO issued the Final Determination on December 1, 1994 denying the labor certification. The CO reasoned as follows:

[The] NOF indicated to you that these findings resulted from your titling the job "Urban Designer", an occupation non-existent in the D.O.T. On rebuttal, you state 'Urban Designer is not a profession, but a specialization.' If so, it is a specialization not recognized by the D.O.T., meaning a determination whether your terms and conditions of employment would have an adverse effect on U.S. workers cannot be made. Not even the four different wage sources you cited list the occupation you placed in box 9. The Minuteman Press decision states that it is

your responsibility to designate a D.O.T. title in box 9 that comes closest to defining the job duties offered so that a proper prevailing wage determination can be made.

In the Final Determination, the CO also continued to dispute the employer's rejection of the named four applicants. The CO argued that the U.S. applicants appeared to have combinations of experience, education and/or training enabling them to perform the job duties usually associated with city planning. Thus, the CO found that certification could not be granted.

On November 21, 1994, the employer requested administrative review of Denial of Labor Certification pursuant to § 656.21 (b) (1) (AF 1).

Discussion

The issues presented by this appeal are whether the employer offers the prevailing wage as required by § 656.20 (c) (2); whether the requirement that applicants have a Master's degree in Urban Design is unduly restrictive, and; whether the employer offers lawful, job-related reasons for rejecting Applicants Hardy, Blake, Blackwell, and Ceremona pursuant to § 656.21 (b) (6).

We first shall address whether the employer offers lawful, job-related reasons for the rejection of the four named applicants. Generally, an employer must show that U.S. applicants were rejected for lawful, job-related reasons. 20 C.F.R. § 656.21 (b) (6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20 (c) (8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. The burden of proof for obtaining labor certification lies with the employer. 20 C.F.R. §656.2 (b).

Generally, an applicant is qualified for a position where he or she meets the minimum requirements specified in the labor certification application. *United Parcel Service*, 90-INA-90 (Mar. 28, 1991); *Mancillas International Ltd.*, 88-INA-321 (Feb. 7, 1990); *Microbilt Corp.*, 87-INA-635 (Jan. 12, 1988). An employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750A. *American Cafe*, 90-INA-26 (Jan. 24, 1991); *Cal-Tex Management Services*, 88-INA-492 (Sept. 19, 1990). In this case, the employer argued that it rejected Mr. Hardy because his undergraduate degree is in Intellectual History. The employer therefore concluded that he lacked formal training in architecture and had no experience with technical architecture drawing (AF 16). The employer makes these assertions despite Mr. Hardy's three years of employment with the architectural and planning firm of Hardy Holtzman Pfeiffer Associates. In addition to this employment experience, Mr. Hardy possesses a Master's degree in Urban Planning from the University of California at Los Angeles, as well as extensive computer experience in the programs AutoCAD, Pagemaker, Aldus Freehand, Paradox, SYSTAT, and ArcInfo (AF 76). The employer stated that it rejected Mr. Blake because he lacked planning experience, and possessed no computing experience in the relevant programs.

Mr. Blake reported that he is a licensed architect, and his resume indicates that he has a Master's degree from Harvard University in Design. In a questionnaire circulated by the state employment agency, Mr. Blake indicated that he was never contacted by the employer (AF 131). The employer contended that it rejected Mr. Blackwell because of his lack of computer experience. Mr. Blackwell indicated that he recently retired after a thirty-five year career in architecture, and admitted that he was not comfortable working in the computer programs AutoCAD and CorelDraw (AF 17). Finally, the employer rejected Mr. Ceremona because he does not have the required Master's degree in Urban Planning.

Viewing this evidence as a whole, we conclude that Applicants Hardy and Blake were rejected for other than lawful, job-related reasons. It is clear that Mr. Hardy possesses the minimum requirements specified by the employer. He has a Master's degree in Urban Planning, as well as extensive computer and work-related experience in field. *See YMCA of Central and Northern Westchester*, 93-INA-6 (Mar. 28, 1994) (the employer improperly rejected U.S. applicant who meets the minimum stated requirements). We also conclude that Mr. Blake was rejected for unlawful reasons because the employer did not fully investigate his qualifications. Although Mr. Blake is a licensed architect with over fourteen years of experience in this field, the applicant indicated that the employer never contacted him. Because the employer failed to comply with § 656.21 (b) (6), certification cannot be granted and further examination of the record is unnecessary.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final

decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: (1) when full Board consideration is necessary to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

***Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington D.C. 20001-8002***

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced type-written pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced type-written pages. Upon the granting of a petition, the Board may order briefs.